Peak Sunrise Development Sdn Bhd v Koo Tuk Su & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCvC-184/12 OF 2022
CHRISTOPHER CHIN J
27 JULY 2023

Words and Phrases — 'tiada halangan' — Meaning of — Plaintiff claimed to have access through alternative linkage that was approved by tenth defendant — Whether letter from tenth defendant constituted approval to plaintiff for use of alternative linkage

The plaintiff was developing a residential development known as Forest Hill Residences ('Forest Hill project'). The first to ninth defendants were residents or owners of houses in Taman Reservoir, a residential project adjacent to the Forest Hill Project ('Reservoir project'). Within the Reservoir project was a housing estate road described variously as Lorong Reservoir ('the road reserve'). The Forest Hill project's approved access was through an adjacent established road known as Jalan Shantung. The plaintiff claimed that the Forest Hill project also had access through an alternative linkage through the road reserve of the Reservoir project, alleging that the alternative access was approved by the tenth defendant ie Majlis Daerah Penampang ('MDP') which was the local authority ('LA') having jurisdictional control over the same. The Forest Hill project was located within the jurisdictional boundaries of the city of Kota Kinabalu. The disputed alternative linkage and the road reserve fell within the neighbouring LA of MDP. It followed that MDP had the final say on the use of the roads within its jurisdictional boundaries. The issue for consideration was whether the letter from MDP ('MDP's letter') constituted an approval to the plaintiff for the use of the alternative linkage. MDP argued that the letter was not an approval and that the phrase 'tiada halangan' did not mean approval.

Held, allowing encl 15 in part:

(1) The words 'tiada halangan' construed in the context of all the forgoing documents read as a whole was a deliberate statement of approval. MDP had by the MDP's letter expressly approved the plaintiff's traffic impact assessment report and with it, the alternative linkage. The approval had been given and parties had acted on such approval and hence it was unjust for MDP to now go back on their express approval. It was not right for MDP to go back on its word. An application for approval for traffic mitigation which incorporated the alternative linkage had been

considered, tabled before the appropriate sub-committee, and approved by MDP who had the right and authority to so approve (see paras 17 & 19–21).

[Bahasa Malaysia summary

Plaintif membangunkan pembangunan kediaman yang dikenali sebagai Forest Hill Residences ('projek Forest Hill'). Defendan pertama hingga kesembilan ialah penduduk atau pemilik rumah di Taman Reservoir, sebuah projek kediaman bersebelahan dengan Projek Forest Hill ('projek Reservoir'). Di dalam projek Reservoir itu terdapat sebuah jalan taman perumahan yang digambarkan dengan pelbagai cara sebagai Lorong Reservoir ('rezab jalan'). Akses projek Forest Hill yang diluluskan adalah melalui jalan yang dibina bersebelahan yang dikenali sebagai Jalan Shantung. Plaintif menuntut bahawa projek Forest Hill juga mempunyai akses melalui rangkaian alternatif melalui rizab jalan projek Reservoir, mendakwa bahawa laluan alternatif itu diluluskan oleh defendan kesepuluh iaitu Majlis Daerah Penampang ('MDP') yang merupakan pihak berkuasa tempatan ('PBT') mempunyai kawalan bidang kuasa ke atas perkara yang sama. Projek Forest Hill terletak dalam sempadan bidang kuasa bandar Kota Kinabalu. Rangkaian alternatif yang dipertikaikan dan rizab jalan jatuh dalam PBT MDP yang bersebelahan. Ia berikutan bahawa MDP mempunyai kata putus mengenai penggunaan jalan raya dalam sempadan bidang kuasanya. Isu untuk pertimbangan ialah sama ada surat daripada MDP ('surat MDP') membentuk kelulusan kepada plaintif untuk penggunaan rangkaian alternatif. MDP berhujah bahawa surat itu bukan kelulusan dan frasa 'tiada halangan' tidak bermaksud kelulusan.

Diputuskan, membenarkan sebahagian lampiran 15:

(1) Perkataan 'tiada halangan' yang ditafsirkan dalam konteks semua dokumen yang dibaca secara keseluruhan adalah pernyataan kelulusan yang disengajakan. MDP telah melalui surat MDP dengan jelas meluluskan laporan penilaian kesan trafik plaintif dan dengan itu, rangkaian alternatif. Kelulusan telah diberikan dan pihak-pihak telah bertindak atas kelulusan tersebut dan oleh itu adalah tidak adil untuk MDP kini kembali pada kelulusan nyata mereka. Adalah tidak wajar untuk MDP menukar keputusannya. Permohonan untuk kelulusan pengurangan lalu lintas yang menggabungkan rangkaian alternatif telah dipertimbangkan, dibentangkan di hadapan jawatankuasa kecil yang sesuai, dan diluluskan oleh MDP yang mempunyai hak dan kuasa untuk meluluskannya (lihat perenggan 17 & 19–21).]

Legislation referred to

Federal Roads Act 1959
Local Government Ordinance (Cap 20) ss 3, 49(1)(23)
Town and Country Planning Ordinance (Cap 141) ss 4A, 15, 28C(3)

(Chris Thian & Co) for the plaintiff.
(Shelley Yap) for the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth defendants.
(PK Lim & Co) for the tenth defendant.

Christopher Chin J:

[1] It is necessary to first establish the legal principles in play in this case which have a direct bearing on the issues and provide the underlying legal basis to decide such issues.

[2] Firstly, the local authority ('LA') is the planning authority for the area within its jurisdictional boundaries (s 4A of the Town and Country Planning Ordinance (Cap 141) ('the TCPO').

> 4A Every Local Authority shall be the local planning authority for the area of the Local Authority.

In addition, planning control is one of the mandatory functions of the LA by virtue of s 49(1)(23) of the Local Government Ordinance ('the LGO') as well as the Instrument under s 3 of the LGO outlining the mandatory and discretionary functions and powers of the LA.

> 49(1) The Instrument shall provide that subject to the provisions of any written law and subject to limitations and conditions as may be specified therein, an Authority either shall perform or may perform all or any of the following functions in respect of all or any part of its area
>
> ...
>
> (23) regulate and control all buildings and building operations and the repair and removal of ruinous and dangerous buildings and subject to any written law relating to town planning, prohibit the erection of a building of a particular class, design or appearance in particular districts, localities or streets or portions of streets;

[3] Secondly, in the absence of or pending an Approved Scheme (for town planning) *gazetted* under the TCPO, the planning power of the LA under s 15 of the TCPO (Interim Development of Land) vests the LA with the planning authority in respect of smaller parcels of alienated land sought to be developed.

> 15(2) A Local Authority may with the approval of the Central Board during any period of prohibition under the provisions of subsection (1), do all or any of the following things, that is to say —
>
> (a) grant to any person applying therefor permission in writing to develop land, construct, demolish, alter, extend, repair, or renew a particular building in the area to which such scheme is proposed to relate;

A (b) prohibit the further proceeding with the development of land or construction, demolition, alteration, extension, repair, or renewal of any particular building situate in the said area, stating in writing their reasons for such prohibition.

B **[4]** Thirdly, by virtue of the powers under s 15 of the TCPO as well as the legal consequences of a development plan approved by virtue of the said s 15, the planning or scheme of use within an approved development plan operates as if such approved development plan were an approved scheme save within the limited boundaries of the lands sought to be developed.

C

[5] Fourthly, the total land to be developed including reserves within a development plan must be equal to the original land area evidenced in the document of title.

D

[6] Fifthly, a development plan which a landowner applies for approval from a LA is a specific offer by the landowner to the LA where in exchange for panning permission the landowner would offer to surrender part of his lands for public purposes such as road reserves, open spaces, drain reserves, sewerage E treatment plan as well as SESB reserves, all of which serve his development and at no land cost to the LA. There is no cost to the LA (or other authority) for such reserves because the land for such reserves were never acquired by the LA but were offered by the landowner as consideration for the approval of his development plan. The application for planning permission has to be signed by F the landowner. Section 28C(3) of the TCPO:

28C Application for planning permission.

(1) An application for planning permission in respect of any development shall be made to the Local Authority and shall be in such form, contain G such particulars and be accompanied by such documents, plans and fees as may be prescribed.

(2) In addition to the documents and plans required to be submitted under subsection (1), the applicant shall also submit together with the application layout plans, the details of which are specified in section 28D. H

(3) If the applicant is not the owner of the land on which the development is to be carried out, *the written consent of the owner thereof to the proposed development shall be obtained and endorsed on the application.*

(4) The applicant may apply for planning permission for the land as a whole I and request that development be carried out in stages.

(5) The Local Authority may approve or reject any application for planning permission or may grant conditional approval subject to such alterations or conditions as the Local Authority may deem fit to impose. (Emphasis added.)

[7] As a consequence, all reserves, whether or not contained within alienated land or where ownership has been already transferred to the LA is held by the landowner or developer as bare trustee for the LA or the relevant authority concerned.

[8] It follows with such ownership, registered or beneficial of the LA in such reserves, that the use and maintenance of road reserves vests with the LA. In Sabah, although certain roads are not *gazetted* under the Federal Roads Act 1959, there seems to be an administrative arrangement whereby the State JKR would maintain the State roads. It is understood that all the roads under the road hierarchy in Sabah from primary highways, secondary roads and local access roads are all under the State control in order for the State to perform the terms of certain concessions granted by the State for the repair and maintenance of these roads.

[9] The above discussion is both necessary and pertinent so as to clearly establish the ownership and authority of a LA over the road and other reserves within that LA's jurisdictional boundaries so as to deal with the issues in this case. The above discussion is substantially extracted from the article 'Understanding Sabah Land Law Through Current Land Issues' (Jan 2021) Journal of the Malaysian Judiciary, paras [33]–[82] which I authored.

BACKGROUND FACTS

[10] The plaintiff is developing a residential development known as Forest Hill Residences on land held under CL 015029731 ('Forest Hill Project'). The first to ninth defendants are residents or owners of houses in Taman Reservoir, a residential project adjacent to the Forest Hill Project ('Reservoir Project'). Within the Reservoir Project is a housing estate road described variously as Lorong Reservoir evidenced by a document of title held under CL215370157 ('the Road Reserve'). This title is alienated solely for the use as a road reserve and came about by virtue of the approved development plan for the Reservoir Project when the same was first mooted by its then landowner.

THE ISSUE OF ACCESS FOR FOREST HILL PROJECT

[11] The Forest Hill Project's approved access (based on its approved development plan) is through an adjacent established road known as Jalan Shantung. The plaintiff, now claims that the Forest Hill Project also has access through an alternative linkage through the Road Reserve of the Reservoir Project, alleging that the Alternative Access was approved by the tenth defendant, Majlis Daerah Penampang ('MDP') which is the LA having jurisdictional control over the same.

JURISDICTION ISSUE

[12] Forest Hill Project is located within the jurisdictional boundaries of the City of Kota Kinabalu ('DBKK'). The disputed alternative linkage and the Road Reserve falls within the neighbouring LA of MDP (tenth defendant). In the light of the discussion on planning issues above, it follows that MDP has the final say on the use of the roads within its jurisdictional boundaries.

[13] DBKK conceded in encl 11 that the alternative linkage was outside its jurisdiction and hence any approval or comment it made on this issue would be ultra vires its authority. DBKK further conceded that the authority with jurisdiction over the alternative linkage is MDP.

WAS THERE APPROVAL FOR THE ALTERNATIVE LINKAGE BY MDP?

[14] This issue boils down to whether the letter from MDP exhibited as DL21 in encl 2 dated 17 May 2019 ('MDP's letter') constitutes an approval to the plaintiff for the use of the alternative linkage. This letter was issued as a result of a consultation by the State Jabatan Kerja Raya ('JKR') to MDP in relation to the Traffic Site Plan and Traffic Site Planning and Traffic Impact Assessment report marked DL-6 and DL-7 in encl 2. In both these exhibits the alternative linkage was referred to.

MDP's letter addressed to the plaintiff's consultant states:

> Tarikh 17 Mei 2019
>
> JK Bersatu Sdn Bhd (Plaintiff's consultant)
>
> Tuan
>
> (description of the project and describing both the developer (Plaintiff and the landowner)
>
> – Traffic Impact Assessment (TIA) Approval
>
> Dengan hormatnya, perkara di atas dirujuk.
>
> 02. Sila maklum bahawa permohonan tuan di atas telah pun dibentangkan di dalam Mesyuarat Jawatankuasa Peredaran Lalulintas Bil.1 Tahun 2019 yang diadakan pada 26 Mei 2019.
>
> 03. Mesyuarat mengambil maklum bahawa permohonan ini terletak di bawah bidangkuasa Dewan Bandaraya Kota Kinabalu (DBKK) dan telah mendapat kelulusan pelan pembangunan daripada DBKK. Majlis telah menerima surat daripada JKR bertarikh 30 Januari 2019, yang mencadangkan agar cadangan mitigasi ini dibentangkan dalam jawatankuasa ini.
>
> 04. Setelah dibentang, dibincang dan diteliti, mesyuarat tiada halangan terhadap permohonan ini.
>
> Sekian, terima kasih.

(signed)
TANG YANG MING
Pegawai Eksekutif

[15] The tenth defendant (MDP) now argues, somewhat incredulously, that the above letter is not approval and that the phrase 'tiada halangan' ('no objection') does not mean approval. If it is not approval then what is the purpose of this letter? If this letter evidenced a rejection then surely the words 'tidak diluluskan' (not approved) or 'tidak boleh ditimbangkan' (cannot be considered) would have been used, but they were not.

[16] The denial of the approval by MDP (tenth defendant) is seen in under encl 16, the affidavit in opposition by Robert bin Malangking who affirmed that he was the Executive Officer of MDP at 'all material times'. This is strange because at the material time D21 (MDP's letter) was issued, it was signed by one Tang Yang Ming, who also labels himself as the 'Executive Officer'. As far as I know, the LGO only permits one executive officer per LA.

[17] The words, 'tidak halangan' construed in the context of all the forgoing documents read as a whole is a deliberate statement of approval. This phrase appears to me to have been coined over the years by persons who have a pathological fear of accepting responsibility in what they really want to say. They want to approve but without expressly saying so. MDP further argues that the this cannot be an approval since there is no submission of the Traffic Impact Assessment Report. I cannot come close to accepting this argument because the headline or subject matter of this letter expressly states in unequivocal terms:

– Traffic Impact Assessment (TIA) *Approval* (Emphasis added.)

[18] To me it is mischievous for officials to retract their approval when faced with objections from third parties which escalates to their superiors or to their political masters.

[19] I find that the tenth defendant, MDP had by the MDP's letter expressly approved the plaintiff's Traffic Impact Assessment Report and with it, the alternative linkage. If there is an issue of some arrangement between MDP and DBKK whereby MDP had allowed DBKK some say in traffic matters, then I note in p 380 of encl 2 DBKK had on the 2 July 2018 issued a letter for 'Kelulusan Pelan Sistem Jalan Raya' for the Forest Hill Project with a plan attached clearly showing the alternative linkage.

[20] To me the crux of this case, being the stand taken by the tenth defendant, is one of back pedalling and back tracking on the affirmative

approval it had already given, for reasons best known to themselves. The approval had been given and parties have acted on such approval and hence it is unjust for MDP to now go back on their express approval.

[21] It is not right for MDP (the tenth defendant) to go back on its word. An application for approval for traffic mitigation which incorporates the alternative linkage had been considered, tabled before the appropriate sub-committee, and approved by MDP who had the right and authority to so approve.

[22] In p 401 of encl 2, the Executive Officer of MDP, Robert Malangkig then approved to the defendants, the construction of a barrier over the Road Reserve, and in so doing is unilaterally going against the decision of the full MDP Council who had earlier approved the plaintiff's access over the same. I say this as I do not see the approval of the relevant Jawatankuasa resolving to reverse the approval earlier given by the MDP's letter. This action by MDP is unconscionable.

Accordingly, I allow encl 15 in part and order and say as follows:

(1) Local Authorities have the monopoly on planning issues within its jurisdiction and in the absence of an Approved Scheme under the TCPO;

(2) by virtue of s 15 of TCPO (Interim Development of Land), an approved Development Plan when accepted with development commenced, has the legal and procedural effect of an Approved Scheme but restricted to the boundaries of such approved plan;

(3) road and other reserves in an approved development plan represent land areas offered by the landowner to the State in exchange for or as consideration for planning approval for the landowner's land;

(4) therefore, all reserves, whether or not evidenced by documents of title, are legally and beneficially owned by the LA or other authority or by the State with the full power and right to develop, manage, maintain and administer the same in accordance with the approved development plan. Until so transferred to the authority concerned, the landowner holds the registered ownership of the same as bare trustee for the authority concerned;

(5) in the light of the forgoing, the MDP's letter in D21 (encl 2) represents an approval by the tenth defendant as LA, for the road traffic flow for the plaintiff's Forest Hill Project and which already incorporates the alternative linkage;

(6) and hence, I allow prayers (a), (b1), (b) and (c) of encl 15 as follows:

(a) A declaration that the Plaintiff, its agents, servants, nominees and/or whomsoever deriving title from the Plaintiff have a legal and/or equitable right to access such part of the public road and/or road reserve held under CL215370157 that connects to Jalan Bundusan.

(b1) A declaration that the 10th Defendant has allowed and/or approved and/or given permission for the construction of the alternative linkage that connects the Plaintiff's development held under CL 015029731 to such part of the public road and/or road reserve held under CL215370157.

(b) A declaration that the threatened or intended acts of the 1st to 9th Defendants to construct a fence or any form of obstruction on the portion of the public road and/or road reserve known as Lorong Reservoir 1B held under CL 215370157 or any part thereof infringes and/or wrongfully interferes with:

(i) the Plaintiff's right to construct the approved alternative linkage per the relevant approved plans that connects the Plaintiff's development held under CL 015029731 to such part of the public road and/or road reserve held under CL215370157;

(ii) the Plaintiff's legal and/or equitable right to use and/or access (vide the approved alternative linkage) such part of the public road and/or road reserve held under CL215370157.

(c) An injunction to restrain the 1st to 9th Defendants whether by themselves, or their agents, servants and/or nominees from constructing a fence or any form of obstruction on the portion of the road reserve known as Lorong Reservoir 1B or on any part of the road reserve held under CL215370157 that:

(i) prevents the Plaintiff, its servants and/or agents from constructing the approved alternative linkage per the relevant approved plans;

(ii) seals off or obstructs in any manner howsoever the approved alternative linkage; or

(iii) seals off or obstructs in any manner howsoever the Plaintiff's right to use and/or access (vide the approved alternative linkage) such part of the public road and/or road reserve held under CL215370157

(7) that the tenth defendant be responsible to forthwith remove barriers on CL215370157 (the Road Reserve);

(8) the tenth defendant is to take such steps as are necessary to restrict and control the use of the Road Reserve by the plaintiff or all those claiming under them, consonant to the tenth defendant's policies, standards and practices for housing estate roads; and

(9) global costs to the plaintiff of RM3,000 to be borne equally by all the defendants subject to allocatur.

A Nothing in today's order is intended to restrict or prevent the tenth defendant from exercising and discharging any of its statutory powers and functions under the LGO, its Instrument and other related legislation.

Enclosure 15 allowed in part.

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Reported by Ahmad Ismail

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